APPENDIX

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APPENDIX A

Statutory Provisions

Part II, Interstate Commerce Act:

§ 204 (49 U.S.C., § 304)

"(a) It shall be the duty of the Commission—

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and"

§ 206 (49 U.S.C., § 306)

(a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: PROVIDED, HOWEVER, That, subject, to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the

fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: AND PROVIDED FURTHER, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

§ 208 (49 U.S.C., § 308)

(a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): PROVIDED, HOWEVER, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory

specified in the certificate, as the development of the business and the demands of the public shall require.

§ 212 (U.S.C., § 212)

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit or license: PROVIDED, HOWEVER, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: AND PROVIDED FURTHER, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

§ 222 (49 U.S.C., § 322)

"(b) If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 4907

ALBERT J. DEMELLE, d.b.a.
CURLEY'S TRANSPORTATION COMPANY, *Defendant, Appellant,*

v.

INTERSTATE COMMERCE COMMISSION,
Plaintiff, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[124 F. Supp. 514]

Before MAGRUDER, *Chief Judge,* and WOODBURY and HARTIGAN, *Circuit Judges.*

Harry C. Ames, Jr., with whom *Wilfred A. Hay* was on brief, for appellant.

Herman F. Mueller, Attorney, with whom *Peter Mills,* United States Attorney, and *A. J. Merrill,* Attorney, were on brief, for appellee.

Opinion of the Court

February 23, 1955.

HARTIGAN, *Circuit Judge.* This is an appeal by the defendant, Albert J. Demelle, from a judgment of the United States District Court for the District of Maine entered

September 22, 1954, under 49 U.S.C. § 322(b), enjoining the defendant from carrying on interstate motor carrier operations to points in Maine other than those covered by a certificate of public convenience and necessity issued to the defendant by the Interstate Commerce Commission on June 13, 1949.

The certificate in question, insofar as the irregular route authority with which we are solely concerned, reads:

"IRREGULAR ROUTES:

General commodities, with exceptions as specified on sheet No. 1,

Between points and places within 20 miles of Boston, Mass., Providence, R.I., and Sanford, Maine, except points and places in New Hampshire, and Lebanon, Berwick, and South Berwick, Maine, and points and places in Maine on and east of U.S. Highway 1."

The defendant also had been granted in this certificate of June 13, 1949 regular routes between Sanford, Maine, and Providence, R.I., between Smithtown, N.H., and South Barre, Mass., between Boston, Mass., and Waterville, Maine; and between Providence, R.I. and Boston, Mass., but we are not concerned with these regular routes in this case. The defendant admitted in his answer that he had transported goods to certain points in Maine on and east of U.S. Highway 1 which the Interstate Commerce Commission in its complaint alleged were not within the authority of any certificate of public convenience and necessity issued by it. The sole issue before the district court was ". . . the interpretation of the clause, '. . . and points in Maine on and east of United States Highway No. 1', as contained in the provision with respect to the irregular route authority."

The Commission, following the filing of the defendant's answer, moved for summary judgment. Fed. R. Civ. P. 56. The defendant moved to strike certain exhibits attached to

the Commission's motion for summary judgment and this motion was granted. It was stipulated by the parties that there was no genuine issue as to any material fact and that the sole issue before the court was the interpretation of the defendant's irregular route authority. The Commission contended in substance that under this irregular route authority the defendant could only carry goods between points and places within 20 miles of: (1) Boston, Mass., (2) Providence, R.I., and (3) Sanford, Maine, except points and places in New Hampshire, and Lebanon, Berwick, and South Berwick, Maine, and points and places in Maine on and east of U.S. Highway 1. The defendant contended that the certificate allows it to carry goods between: (1) points and places within 20 miles of Boston, (2) points and places within 20 miles of Providence, (3) points and places within 20 miles of Sanford, except points and places in New Hampshire, and Lebanon, Berwick, and South Berwick, Maine, and (4) points and places in Maine on and east of U.S. Highway 1.

The district court in its opinion stated that:

> "After a careful consideration of the entire provision relating to the irregular route authority, this Court is of the opinion that the aforementioned clause of the Irregular Route Authority is not a grant of additional authority, as contended by the defendant, but an exception to the grant contained in that provision as contended by the Plaintiff. This Court interprets the Irregular Route provision as authorizing service to points in Maine located in the territory within a radius of 20 miles of Sanford, except Lebanon, Berwick, and South Berwick, *and also except* points in Maine located on and east of U.S. Highway 1, within a radius of 20 miles of Sanford, Maine."

The defendant now contends that the finding by the district court was erroneous and that a true construction of

the certificate in question would permit the defendant to operate as a common carrier to all points and places in Maine on and east of U.S. Highway 1.

Rule 56(c) of the Federal Rules of Civil Procedure states in part that summary judgment ". . . shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The defendant did not base his defense on the ground that the certificate was a mistake and incorrectly represented the intention of the Commission, but rather on the ground that the provision in the certificate relating to irregular routes was not ambiguous. The defendant consequently did not assert in the lower court that there was any issue of fact involved and "Since no questions of fact were raised in the district court they may not be presented nor considered here." *Shafer* v. *Reo Motors,* 205 F. 2d 685, 688 (3 Cir. 1953). Moreover, both the plaintiff and defendant stipulated that there was no genuine issue of fact. The defendant did not attempt to indicate that there existed an issue of fact by introducing exhibits or affidavits following the Commission's motion for summary judgment and, therefore, he cannot now claim that he was deprived of a trial on any material issue of fact. See *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 635 (1953); *Helvering* v. *Rubinstein,* 124 F. 2d 969 (8 Cir. 1942).

The defendant apparently believed that his interpretation of the certificate would be accepted by the district court and relied solely upon the words of the certificate. Thus, when the district court granted summary judgment, there were no factual issues to be decided, and there was no indication that any evidence would be offered in an attempt to prove what the intention of the Commission had been when this certificate was granted—there was only the language of the certificate itself.

We believe that the Commission should have couched the irregular route authority in such explicit language as to avoid any possible question as to its meaning but, in our opinion, the construction which the district court has placed upon the language of the certificate is a more tenable one than that advocated by the defendant. The defendant's contention would be more plausible if U. S. Highway 1 did not pass within 20 miles of Sanford, Maine, but, as the Commission points out, some 30 miles of U. S. Highway 1 is within 20 miles of Sanford, Maine. It is clear that Lebanon, Berwick, and South Berwick, Maine, which are within 20 miles of Sanford, Maine, are exceptions to the defendant's grant. It would have been illogical and redundant for the Commission to grant the defendant an irregular route authority to all points within 20 miles of Sanford and then also specifically to grant the defendant irregular route authority to points such as Lebanon, Berwick, and South Berwick, which are within that 20 mile area. The certificate, however, does not repeat the word "except" before "Lebanon, Berwick, and South Berwick, Maine" yet these places are conceded to be exceptions to the defendant's irregular route authority. Therefore, we are not convinced by the defendant's argument that the omission of the word "except" before "points and places in Maine on and east of U.S. Highway 1" necessitates holding that such "points and places" are within the defendant's grant of authority rather than being exceptions thereto. We think it more reasonable to assume that "except" was intended not only to relate to "Lebanon, Berwick, and South Berwick, Maine" but also to "points and places in Maine on and east of U.S. Highway 1."

We, therefore, agree with the district court that the phrase, "points and places in Maine on and east of U.S. Highway 1", is not a grant of an additional irregular route authority but, like "points and places in New Hampshire, and Lebanon, Berwick, and South Berwick, Maine", is an exception to the irregular route authority.

The judgment of the district court is affirmed.

WOODBURY, *Circuit Judge*, (concurring). I concur in the result for I believe that it is more probable than not that the certificate means what Judge Clifford and this Court think that it means. However, I do not wish to go on record as subscribing to the proposition that the failure of the parties to raise a question of fact below, or their stipulation that no issue of fact existed, necessarily requires that this case be disposed of on the motion for summary judgment filed by the Commission under Rule 56(c). That is to say, I think that in spite of the conduct of the parties or their stipulation, the district court might have refused to grant the Commission's motion for summary judgment if in its opinion the resolution of an issue of fact was necessary for decision. Thus in this case, if I felt that the certificate standing alone was so ambiguous as to be wholly unintelligible, I would say that, since the rights claimed are "grandfather" rights, the district court in spite of the parties' concessions, tacit or otherwise, that no issues of fact existed, might have required the production of evidence as to the scope of the carrier's activities prior to the critical date to show what must have been the scope of the authority granted by the certificate. And I would say that if we were in grave doubt as to the meaning of the certificate we could remand to the district court for the purpose of receiving such evidence.

APPENDIX C

PROCEEDINGS IN COURT OF APPEALS

On the same day, February 23, 1955, the following judgment was entered:

Judgment

February 23, 1955

This cause came on to be heard on the record on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk

Thereafter, on March 11, 1955, mandate issued to the District Court.